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Tan Poh Yee v Tan Boon Thien and other appeals

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-997–05 OF 2016, W-02(IM)(NCC)-998–05 OF 2016 AND W-02(IM)(NCC)-1005–05 OF 2016
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
9 JANUARY 2017

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Civil Procedure — Striking out — Application to strike out action — Amended writ and statement of claim — Whether trial judge erred in dismissing applications to strike out — Whether plain and obvious case for striking out respondent's claim — Whether there was privity of contract between appellants and respondent — Whether respondent had locus standi to enforce 2004 agreement — Whether respondent had reasonable cause of action against appellants — Whether respondent's inability to specify precise date upon which 2004 agreement was entered into fatal to his case — Limitation — Whether respondent's claim time-barred — Whether limitation period set in — Whether respondent's claim was lacking bona fides and abuse of process of court

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The appellants and respondents in these three appeals, which arose from one civil action, were all siblings and the children of the late Madam Chang Ying ('late Madam Chang') and Tan Kim Choo ('Tan'), who incorporated the company known as Tan Kim Choo Holdings Sdn Bhd ('TKCH'). Until the demise of the late Madam Chang on 30 July 2006, she and Tan held 40% of the shares in TKCH, while the three appellants and respondent each held 15% of the shares in the company. Sometime in August 2015, Tan had suffered a massive stroke that had left him physically limited and unable to manage his property and interests. The first and second appellants as directors of TKCH had requisitioned an EGM of TKCH to remove the respondent from the board of directors and to appoint themselves as directors of TKCH with immediate effect. The respondent alleged that the notice to requisition the EGM was issued with bad intention. The respondent also alleged that the appellants had conspired to take over the respondent's interests and shares in TKCH. The respondent claimed that by way of a purported oral agreement in 2004 ('the 2004 agreement') between the late Madam Chang, the appellants and the respondent it had been agreed that the appellants would relinquish and transfer their shares in TKCH to the late Madam Chang and her husband, with the late Madam Chang and Tan to hold the shareholdings transferred by the appellants as trustees for the respondent. Thus, the respondent claimed that upon the passing of the late Madam Chang and Tan, the said shares would be bequeathed and transferred to the respondent. However, the respondent claimed that when the late Madam Chang died on 30 July 2006, the appellants

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had refused or failed to transfer their shares in TKCH to the respondent. Consequently, the respondent filed an action against the appellants and Tan seeking, inter alia, declarations that the 2004 agreement was valid and binding on the appellants and that the EGM was void and illegal, and an order that the appellants transfer their shares in TKCH to the respondent. The appellants filed three separate applications pursuant to O 18 r 19 of the ROC 2012 and under the inherent jurisdiction of the court to strike out the respondent's writ and statement of claim. The High Court dismissed the striking out applications without giving any grounds for such dismissal. These three appeals, which were heard together, emanated from the High Court's decisions in dismissing the appellants' applications. The main thrust of the appellants' argument was that the respondent had no privity of contract to enforce the 2004 agreement because the said 2004 agreement did not involve him. As such, the appellants submitted that there was no privity of contract between the appellants and the respondent. In this appeal the appellants submitted that the trial judge had erred as she had failed to give due consideration to the fact that the declaratory reliefs sought by the respondent were in truth for Tan. As such, the appellants contended that the respondent's claim did not disclose a reasonable cause of action. It was also the appellants' case that the respondent's cause of action was statute barred by s 6(1)(a) of the Limitation Act 1953 given that more than six years had lapsed from the time of the accrual of the cause of action.

Held, allowing the appeals with costs of RM5,000 to be paid to each of the appellants for each appeal subject to the payment of allocatur fees:

(1) It was the respondent's pleaded case that the arrangement pertaining to the alleged trust was solely between Tan and the late Madam Chang on one part and the appellants on the other part. At all material times the respondent had never paid any valuable consideration towards the alleged trust. In the circumstances, there was a good deal of substance in the appellants' argument that the respondent held no privity in respect of any agreement, arrangement or understanding between Tan and the late Madam Chang on the one part and the appellants on the other part (see para 12).

(2) The pleadings and reliefs sought clearly disclosed that the claims by the respondent were actions to be brought by both Tan and the estate of the late Madam Chang and not the respondent. Hence, the respondent had no locus standi to enforce the 2004 agreement, and instead the party ought to have been Tan or the estate of the late Madam Chang. The respondent thus did not have a reasonable cause of action, which rendered his claim that was premised on the 2004 agreement to be plainly and obviously unsustainable and his suit doomed to fail. The respondent was a stranger to the 2004 agreement and as a matter of law could not

take advantage of its provisions notwithstanding that some provisions thereof were intended to benefit him (see paras 17–19).

(3) The date for the conclusion of a valid contract, especially an oral one as in this instant appeal, was pertinent and should be specific to achieve certainty. However, the respondent could not specify the precise date upon which the 2004 agreement was entered into, which was highly prejudicial to the appellants and fatal to the respondent's case. Further, going by the trite legal principle that no evidence should be admissible on an application under O 18 r 19(1)(a) of the ROC 2012 other than the pleadings, it was plain and obvious that the respondent had no reasonable cause of action. Thus, on this ground alone the appeals should be allowed and the respondent's claim struck out (see paras 20–22 & 24).

(4) If there was any truth that there existed any form of trust as alleged, such trust was incompletely constituted. In other words, there was no trust in existence and the appellants remained the absolute owner of the TKCH's shares. At all material times the respondent was merely a volunteer as he had not given any form of valuable consideration for the creation of the alleged trust. The declarations sought by the respondent had the effect of asking the court to enforce an alleged trust and this suit was even more without basis, unarguably frivolous and a blatant abuse of process of the court (see paras 25–26).

(5) In relation to the appellants' case that the respondent's claim was statute barred by limitation it would be necessary to ascertain the date when the cause of action could have accrued. The cause of action in the present case could not have arisen on the date the appellants convened the EGM of TKCH, ie on 30 November 2015, but on 30 July 2006 when the late Madam Chang died and the appellants refused or failed to transfer their shares to the respondent. Thus, the respondent's cause of action founded on a contract would have arisen on the date of its breach which was on 30 July 2006. As such, s 6 of the Limitation Act applied and consequently the respondent was precluded from bringing this action against the appellants. The doctrine of laches had clearly manifested in the respondent's indolence in prosecuting his claim. Premised on the evidence, the respondent's claim against the appellants was clearly frivolous and vexatious rendering it obviously unsustainable. It was also discernible from the pleadings that the respondent's claim was lacking bona fides and was an abuse of the process of the court (see paras 28 & 31–33).

[Bahasa Malaysia summary

Perayu-perayu dan responden-responden dalam tiga rayuan tersebut, yang timbul daripada tindakan sivil, merupakan adik-beradik dan anak-anak mendiang Puan Chang Ying ('mendiang Madam Chang') dan Tan Kim Choo

('Tan'), yang telah memperbadankan syarikat dikenali sebagai Tan Kim Choo Holdings Sdn Bhd ('TKCH'). Sehingga kematian mendiang Madam Chang pada 30 Julai 2006, dia dan Tan memegang 40% saham dalam TKCH, manakala ketiga-tiga perayu dan responden masing-masing memegang 15% saham dalam syarikat. Sekitar Ogos 2015, Tan mengalami strok teruk yang menjadikannya terbatas gerakan secara fizikal dan tidak berupaya menguruskan hartanah dan kepentingannya. Perayu-perayu pertama dan kedua sebagai pengarah-pengarah TKCH telah membuat rekuisisi satu EGM untuk TKCH bagi menyingkir responden dariada lembaga pengarah dan untuk melantik mereka sebagai pengarah-pengarah TKCH dengan serta-merta. Responden mengatakan bahawa notis rekuisisi EGM telah dikeluarkan dengan niat jahat. Responden juga mengatakan bahawa perayu-perayu telah berkonspirasi untuk mengambil alih kepentingan dan saham responden dalam TKCH. Responden mendakwa bahawa melalui perjanjian lisan yang dimaksudkan dalam 2004 ('perjanjian 2004 tersebut') antara mendiang Madam Chang, perayu-perayu dan responden ia telah dipersetujui bahawa perayu-perayu akan melupus dan mengambil alih saham mereka dalam TKCH kepada mendiang Madam Chang dan suaminya, yang mana mendiang Madam Chang dan Tan memegang pegangan saham yang dipindahkan oleh perayu-perayu sebagai pemegang amanah untuk responden. Oleh itu, responden mendakwa bahawa selepas mendiang Madam Chang dan Tan, saham tersebut telah diberi dan dipindahkan kepada responden. Walau bagaimanapun, responden mendakwa bahawa apabila Madam Chang meninggal dunia pada 30 Julai 2006, perayu-perayu telah enggan atau gagal memindahkan saham mereka dalam TKCH kepada responden. Berikutan itu, responden telah memfailkan tindakan terhadap perayu-perayu dan Tan memohon, antara lain, deklarasi bahawa perjanjian 2004 tersebut adalah sah dan mengikat ke atas perayu-perayu dan bahawa EGM tersebut tidak sah dan menyalahi undang-undang, dan satu perintah bahawa perayu-perayu telah memindahkan saham mereka dalam TKCH kepada responded. Perayu-perayu telah memfailkan tiga permohonan berasingan menurut A 18 k 19 KM 2012 dan di bawah bidang kuasa sedia ada mahkamah untuk membatalkan writ dan penyataan tuntutan responden. Mahkamah Tinggi telah menolak permohonan pembatalan itu tanpa memberikan apa-apa alasan untuk penolakan tersebut. Tiga rayuan tersebut, yang telah didengar bersama, timbul daripada keputusan Mahkamah Tinggi dalam menolak permohonan perayu-perayu. Isu utama hujah perayu-perayu adalah bahawa responden tidak mempunyai privi kontrak untuk menguatkasakan perjanjian 2004 tersebut kerana perjanjian 2004 tersebut tidak melibatkannya. Oleh itu, perayu-perayu berhujah bahawa tidak terdapat privi kontrak antara perayu-perayu dan responden. Dalam rayuan ini perayu-perayu berhujah bahawa hakim perbicaraan terkhilaf kerana beliau gagal memberikan pertimbangan sewajarnya terhadap fakta bahawa relif perisytiharan yang dipohon oleh responden sebenarnya untuk Tan. Oleh demikian, perayu-perayu menegaskan bahawa tuntutan responden tidak menunjukkan kausa tindakan munasabah.

Ia juga kes perayu-perayu bahawa kausa tindakan responden adalah terhad statut oleh s 6(1)(a) Akta Had Masa 1953 dengan mengambil kira lebih enam tahun telah luput dari masa terakru kausa tindakan.

Diputuskan, membenarkan rayuan-rayuan dengan kos RM5,000 untuk dibayar kepada setiap perayu-perayu bagi setiap rayuan tertakluk kepada bayaran fi alokatur:

(1) Ia adalah kes yang dipli responden bahawa urusan berkenaan amanah yang dikatakan semata-mata antara Tan dan mendiang Madam Chang di satu pihak dan perayu-perayu di pihak lain. Pada setiap masa matan responden tidak pernah membayar apa-apa balasan bernilai kepada amanah yang dikatakan itu. Dalam keadaan itu, terdapat urusan baik yang kukuh dalam hujah perayu-perayu bahawa responden tidak mempunyai priviti berkaitan apa-apa perjanjian, urusan atau pemahaman antara Tan dan mendiang Madam Chang di satu pihak dan perayu-perayu di pihak lain (lihat perenggan 12)

(2) Pliding dan relif yang dipohon jelas menunjukkan bahawa tuntutan oleh responden adalah tindakan-tindakan yang dimulakan oleh kedua-dua Tan dan harta pusakan mendiang Madam Chang dan bukan responden. Justeru, responden tidak mempunyai locus standi untuk menguatkuasakan perjanjian 2004, dan oleh itu tidak mepunyai kausa tindakan munasabah, yang menjadikan tuntutannya yang berpremiskan perjanjian 2004 jelas dan nyata tidak boleh dikekalkan dan guamanya pasti gagal. Responden adalah orang asing kepada perjanjian 2004 dan dari segi undang-undang tidak boleh mengambil kesempatan ke atas peruntukan-peruntukannya walau apa pun beberapa peruntukan bertujuan untuk memberi manfaat kepadanya (lihat perenggan 17–19).

(3) Tarikh untuk kesimpulan kontrak yang sah, terutamanya yang lisan sepertimana dalam rayuan ini, adalah penting dan patut spesifik untk mencapai suatu kepastian. Walau bagaimanapun, responden tidak menetapkan tarikh tertentu yang mana perjanjian 2004 yang dimasuki itu, yang prejudis kepada perayu-perayu dan mudarat kepada kes responden. Selanjutnya, berdasarkan preinsip perundangan yang lapuk bahawa tiada keterangan patut boleh diterima atas permohonan di bawah A 18 k 19 KM 2012 selain daripada pliding, ia adalah jelas dan nyata bahawa responden tidak mempunyai kausa tindakan yang munasabah. Oleh itu, berdasarkan alasan ini sahaja rayuan-rayuan itu patut dibenarkan dan tuntutan responden dibatalkan (lihat perenggan 20–22 & 24).

(4) Jika terdapat apa-apa kebenaran bahawa wujud apa-apa bentuk amanah sepertimana dikatakan, amanah sedemikian tidak lengkap dibentuk. Dalam erti kata lain, tiada amanah wujud dan perayu-perayu kekal pemilik mutlak saham TKCH. Pada setiap masa matan responden hanya

seorang sukarela kerana dia tidak memberikan apa-apa bentuk balasan bernilai untuk pembentukan kepercayaan yang dikatakan itu. Deklarasi yang dipohon oleh responden mempunyai kesan memohon mahkamah menguatkuasakan amanah yang dikatakan dan guaman ini tidak mempunyai asas langsung, jelas remeh dan nyata satu penyalahgunaan proses mahkamah (lihat perenggan 25–26).

(5) Berhubung kes perayu-perayu bahawa tuntutan responden adalah dihalang statut disebabkan had masa ia adalah perlu untuk menentukan tarikh bila kausa tindakan terakru. Kausa tindakan dalam kes ini tidak mungkin timbul pada tarikh perayu-perayu mengadakan EGM untuk TKCH, iaitu 30 November 2015, tetapi pada 30 Julai 2006 apabila mendiang Madam Chang meninggal dunia dan perayu-peryau enggan dan gagal memindahkan saham mereka kepada responden. Oleh itu, kausa tindakan responden berasaskan kontrak yang mungkin timbul pada tarikh pelanggarannya iaitu pada 30 Julai 2006. Oleh itu, s 6 Akta Had Masa terpakai dan berikutan itu responden terkecuali daripada memulakan tindakan ini terhadap perayu-perayu. Doktrin *laches* jelas terbukti dalam ketidak upayaan responden melaksanakan tuntutannya. Berasaskan keterangan itu, tuntutan responden terhadap perayu-perayu jelas remeh dan menyusahkan menyebabkannya jelas tidak boleh dikekalkan. Ia juga berdasarkan pliding bahawa tuntutan responden tidak mempunyai niat baik dan merupakan penyalahgunaan proses mahkamah (lihat perenggan 28 & 31–33).]

Notes

For cases on application to strike out action, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 8809–8847.

Cases referred to

Bacom Enterprises Sdn Bhd v Jong Chuk & Ors [2011] 5 MLJ 820, CA (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Berjaya Development Sdn Bhd v Keretapi Tanah Melayu Bhd & Anor [2007] 7 MLJ 489, CA (refd)

Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd [2015] 1 MLJ 284, CA (refd)

Brilliant Team Management Sdn Bhd v South East Pahang Oil Palm Sdn Bhd & Ors [2007] 1 MLJ 536; [2006] 2 CLJ 1218, HC (refd)

Chong Nyuk Fung & Anor v Loi Lung Kiong & Ors [1998] MLJU 41; [1998] 5 CLJ 146, HC (refd)

Choong Howei v Cheah Choo Eng & Ors and another appeal [2015] 6 MLJ 95, CA (refd)

Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd [2006] 4 MLJ 271; [2006] 2 CLJ 1021, CA (refd)

Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd [2011] 2 MLJ 192, CA (refd)
Johor Capital Holdings Sdn Bhd v Frank Khoo Shao Hong [2002] 5 MLJ 691; [2002] 6 CLJ 288, HC (refd)
Keongco Malaysia Sdn Bhd v Ng Seah Hai [2012] 7 MLJ 288, HC (refd)
Malayan Banking Berhad v Gan Kong Yam [1972] 1 MLJ 32 (refd)
New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226, FC (refd)
Pacific Inter-Link Sdn Bhd v Wilmar Trading Pte Ltd & Ors [2013] 7 CLJ 312, HC (refd)
Pengiran Othman Shah Bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors [1996] 1 MLJ 309; [1996] 1 CLJ 257, CA (refd)
Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16, SC (refd)
Sampo Materials (M) Sdn Bhd v Tenaga Nasional Bhd [2016] 1 MLJ 375, CA (refd)
Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385; [1985] CLJ Rep 293, SC (folld)
Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614, SC (refd)

Legislation referred to

Companies Act 1965 ss 2(d), 149(1)
Limitation Act 1953 ss 6, 6(1)(a), 32
Mental Health Act 2001
Rules of Court 2012 O 18 r 19, O 18 r 19(1)(a), (1)(b), (1)(d), O 92 r 14

Appeal from: Suit No 22NCC-383–11 of 2015 (High Court, Kuala Lumpur)

Ng Thiang Tuan (Keith Kwan and Chia Poh Yee with him) (Tuan, Mohd Zain & Co) for the appellants.
K Shanmugam (Hasnal Rezua Merican and Mohd Ruzaini Zulkifli with him) (The Chambers of Kamarul Hisham & Hasnal Rezua) for the respondent.

Idrus Harun JCA (delivering judgment of the court):

PRELIMINARIES

[1] There were three appeals before this court. These were Civil Appeal No W-02(IM)(NCC)-997–05 of 2016, Civil Appeal No W-02(IM)(NCC)-1005–05 of 2016 and Civil Appeal No W-02(IM)(NCC)-998–05 of 2016. We found it convenient and appropriate to hear the three appeals together as they arose from one civil action in the Kuala Lumpur High Court under Suit No 22NCC-383–11 of 2015. The

appeals therefore were related whilst undeniably involving the same parties besides the same common core facts and issues. We propose to give reasons for our decisions with respect to these appeals in one common judgment. Before proceeding further, we may mention that in the court below, the respondent herein, namely Tan Boon Thien as the plaintiff, commenced this action against the three appellants and Tan Kim Choo @ Tan Kim Choon as the fourth defendant by way of a writ of summons and statement of claim. The respondent was seeking, inter alia, declarations that a purported oral agreement in 2004 was valid and binding on the appellants, that the appellants ceased to be shareholders of 525,135 shares in Syarikat Tan Kim Choo Holdings Sdn Bhd and the said shares belonged to the fourth defendant. The respondent also sought an order that the appellants do transfer these shares to the fourth defendant. A declaratory order was also sought by the respondent that the extraordinary general meeting of Syarikat Tan Kim Choo Holdings Sdn Bhd requisitioned pursuant to s 149(1) of the Companies Act 1965 on 30 October 2015 was void and illegal.

[2] The appellants in due course filed three separate applications pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of Court 2012 and under the inherent jurisdiction of the court pursuant to O 92 r 14 thereof seeking to strike out the respondent's amended writ of summons dated 23 February 2016 and statement of claim dated 22 January 2016. The High Court dismissed the applications. The learned judge, however notably did not give any grounds for such dismissal. The appeals before this court emanated from the said High Court's decisions in dismissing the appellants' applications. We shall refer to the appellant namely Tan Poh Yee in Appeal No 997 as 'the first appellant', Tan Poh Hui in Appeal No 1005 as 'the second appellant' and Tan Poh Lee in Appeal No 998 as 'the third appellant' and collectively we shall refer to them as the appellants.

[3] Before proceeding further, it is necessary to mention that, at the commencement of this suit, the respondent filed the writ of summons and the statement of claim on 24 November 2015 as the second plaintiff whilst the fourth defendant who was the respondent's father, was named as the first plaintiff apparently without the instruction of the latter. Subsequently, the respondent changed or amended the capacity of the first plaintiff at a preliminary stage of this action to the fourth defendant pursuant to an order dated 17 February 2016.

THE FACTS

[4] The background to this case is set out comprehensively in the amended statement of claim. We begin by stating that the respondent's cause of action on the face of the pleadings reveals the undisputed fact that the respondent and the

appellants are the children of the fourth defendant and the late Madam Chang Ying. On 21 June 1989, the fourth defendant, together with the late Madam Chang Ying incorporated Tan Kim Choo Enterprise Sdn Bhd pursuant to the Companies Act 1965. Subsequently, on 16 May 1997, the company's name was changed to its present name, Tan Kim Choo Holdings Sdn Bhd ('TKCH'). Since 12 December 1989 and until the demise of Madam Chang Ying on 31 July 2006, the particulars of TKCH's shareholdings were as follows:

(a) the fourth defendant — 233,393 shares (20%);

(b) Madam Chang Ying — 233,392 shares (20%);

(c) the respondent — 175,045 shares (15%);

(d) the first appellant — 175,045 shares (15%);

(e) the second appellant — 175,045 shares (15%); and

(f) the third appellant — 175,045 shares (15%).

[5] The respondent's contentions in his pleaded case in a nutshell were confined to his assertion that there was a purported oral agreement in 2004 ('the purported 2004 agreement') between the fourth defendant, Madam Chang Ying and the appellants wherein the appellants were to relinquish and transfer their shares in TKCH to the fourth defendant and Madam Chang Ying. The purported 2004 agreement was made at a meeting in Singapore when the fourth defendant, who was stricken with nose cancer at the relevant time, was undergoing treatment at Gleneagles Hospital. The meeting, the respondent alleged, was attended by the respondent, the appellants, the late Madam Chang Ying and the solicitor for the family namely Chew Phye Keat who witnessed the agenda discussed and the agreement reached thereat. These shares, totalling 525,135 units, were purportedly agreed to be transferred in the following manner:

(a) 175,045 shares were to be transferred by the third appellant to the fourth defendant;

(b) 175,045 shares were to be transferred by the second appellant to Madam Chang Ying;

(c) 87,523 shares were to be transferred by the first appellant to the fourth defendant; and

(d) 87,522 shares were to be transferred by the first appellant to Madam Chang Ying.

[6] It was allegedly agreed at the meeting that the fourth defendant and Madam Chang Ying were to hold the shareholdings transferred by the appellants as trustees for the respondent. Upon the passing of the fourth

defendant and Madam Chang Ying, the shareholdings transferred by the appellants (totalling 525,135 shares) would be bequeathed and transferred to the respondent. The control of the management in TKCH should always be left in the hands of the fourth defendant.

[7] The respondent further averred that a property in Brickfields held under titles 4461–4466, Lots 408–413, Seksyen 55 in the District of Kuala Lumpur ('the Brickfields property') owned by TKCH would be transferred to a company incorporated for the purpose of holding the Brickfields property. The shareholdings of this newly incorporated company would be entirely held by the fourth defendant and Madam Chang Ying as trustees for the appellants. Upon the passing of the fourth defendant and Madam Chang Ying, the shareholdings of this newly incorporated company would be bequeathed and transferred to the appellants. However, as events transpired, the first and second appellants' shares in TKCH totalling 262,567 units which were supposed to be transferred to Madam Chang Ying were not transferred. The respondent alleged those shares thus to be improperly held by the appellants. The respondent also alleged that the appellants failed to transfer their shares in TKCH to the fourth defendant.

[8] The Brickfields property owned by TKCH was sold to Median Vision Sdn Bhd ('Median Vision') for RM6m as valuable consideration pursuant to a sale and purchase agreement dated 27 May 2004 ('exh F'). Median Vision for the aforementioned purpose was incorporated upon the return of the family from Singapore but the respondent alleged that contrary to the purported 2004 agreement, the appellants became the majority shareholders holding 6,200,000 shares whilst the fourth defendant and Madam Chang Ying were the nominal shareholders thereof. It was further alleged that Median Vision never paid the purchase sum of RM6m to TKCH. It was the respondent's pleaded case that upon the completion of the transfer of the Brickfields property from TKCH to Median Vision which was controlled by the appellants, they were under the obligation to transfer their 525,135 shares in TKCH to the fourth defendant and Madam Chang Ying. Madam Chang Ying in the meanwhile had on 5 August 2004 executed a will with regard to the distribution of the estate after her demise. This will was alleged to have reflected the purported 2004 agreement ('exh G'). Following the demise of Madam Chang Ying on 31 July 2006, her own shares in TKCH totalling 233,392 units were transferred to the fourth defendant. However, the appellants refused or failed to transfer their 525,135 shares in TKCH to the fourth defendant in accordance with the will and thereby the purported 2004 agreement. The respondent asserted that the appellants' continued holding of their 525,135 shares in TKCH after the purported 2004 agreement until todate was merely as bare trustees for the fourth defendant.

[9] In or around 3 August 2015, the fourth defendant suffered a massive stroke. Since then, he has difficulty in speech and was physically limited. By a letter dated 3 November 2015 sent by the appellants' solicitors namely Messrs Tuan, Mohd Zain & Co to the respondent, the latter had been notified of the appellants' intention to obtain a court order pursuant to the Mental Health Act 2001 to manage the property and interests of the fourth defendant as he was unable to articulate and communicate his intentions clearly and would not be able to make complex decisions concerning his wellbeing, finances and his care. On 30 October 2015, a notice ('exh N') under s 149(1) of the Companies Act 1965 was received by the respondent to requisition the extraordinary general meeting of TKCH on 30 November 2015 to remove the respondent from the board of directors and to appoint the first and second appellants as directors of TKCH with immediate effect. A pertinent point to note is that the directors of TKCH at the material time were the fourth defendant, the respondent and the third appellant. The respondent alleged that the notice in question was issued and the general meeting was convened with bad intention. The respondent additionally alleged that the appellants had conspired amongst themselves to take over the interests and shares of the fourth defendant in TKCH contrary to the purported 2004 agreement, to remove the respondent from TKCH's board and to appoint the first and second appellants as directors.

A B C D E

OUR DELIBERATION AND DECISION

[10] Based on the information that we had garnered from the notices of application and the affidavits in support thereof, the appellants, in seeking to strike out the amended writ of summons and statement of claim, relied in the main on the grounds that the respondent's pleaded case disclosed no reasonable cause of action, was scandalous, frivolous and vexatious and an abuse of process of the court as set out respectively under O 18 r 19(1)(a), (b) and (d) of the Rules of Court 2012. The law may now seem obvious and trite that in determining whether any claim ought to be struck out pursuant to O 18 r 19 of the Rules of Court 2012, recourse to this summary process can only be adopted when it can clearly be seen that the claim is on the face of it obviously unsustainable. The summary power should be exercised in plain and obvious cases only and where the claim on the face of it is obviously bound to fail (*Enersafe Sdn Bhd (formerly known as General Tractors Services Sdn Bhd) v Megarina Sdn Bhd* [2006] 4 MLJ 271; [2006] 2 CLJ 1021). Quite apart from this authority, we should say that there is an abundance of authority for this proposition and it would suffice for this purpose if reference in this connection is made to the Supreme Court's decision in the case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 of which the relevant excerpt at p 37 is reproduced below:

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> The principle upon which the court acts in exercising its power under any of the

four limbs of O 18 r 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'.

[11] Having stated the general principle of law, we would thus start off by deliberating on the argument urged for the appellants that the respondent's claim disclosed no reasonable cause of action. Learned counsel for the appellants on this point pressed with the argument that the decision of the High Court ought to be set aside as the learned Judge failed to give due consideration to the main issue of whether the respondent had reasonable cause of action against the appellants pursuant to the purported 2004 agreement. A main plank in the appellants' submission on this ground was that the respondent had no privity of contract to enforce the purported 2004 agreement. This argument was founded on the fact that, on the face of the pleadings, at all material times, the purported 2004 agreement did not involve him. It therefore patently showed that there was no privity of contract between the appellants and the respondent.

[12] In our opinion, the respondent, as could be seen from his pleaded case, had firmly stated that any arrangement as to the alleged trust in relation to the appellants' shares in TKCH which was believed to be agreed to, was solely between the fourth defendant and Madam Chang Ying on the one part and the appellants on the other part. This fact could evidently be gleaned from the respondent's pleading in paras 16(a)–(b), 19, 23 and 30 of the amended statement of claim. It is to be remembered that the respondent alleged that the appellants' 525,135 units of shares in TKCH which the latter failed to transfer to the fourth defendant and the late Madam Chang Ying pursuant to the purported 2004 agreement meant that the appellants held the shares in bare trusts for the fourth defendant and that upon the passing of the fourth defendant the shares in question would be bequeathed and transferred to the respondent. At all material times the respondent had never paid any valuable consideration towards the alleged trust. In our judgment, there is a good deal of substance in the argument put forward by learned counsel for the appellant that the respondent held no privity in respect of any agreement, arrangement or understanding between the fourth defendant and Madam Chang Ying on the one part and the appellants on the other part.

[13] We would further refer to para 27 of the amended statement of claim in which the respondent had pleaded that the appellants had failed to transfer 262,567 units of shares of TKCH to the estate of Madam Chang Ying. We reproduce the entire para 27 of the amended statement of claim below:

P merujuk kepada Perjanjian Lisan 2004 dan memplidkan bahawa saham milik mendiang Puan Chang Ying di dalam Syarikat Tan Kim Choo adalah terdiri

daripada 233,392 unit saham yang didaftarkan di atas nama mendiang Puan Chang Ying dan 262,567 unit saham yang sehingga kini masih dipegang oleh D1, D2 dan D3 secara tidak sah.

Added to that, in para 30 of the amended statement of claim the respondent pleads:

P memplidkan bahawa walaupun selepas kematian mendiang Puan Chang Ying, dan D1, D2 dan D3 (the appellants herein) mengetahui mengenai perenggan 4.1.1 wasiat mendiang Puan Chang Ying, D1, D2 dan D3 tetap, sehingga kini, enggan dan/atau cuai dan/atau abai memindahkan 525,135 unit saham yang masih dipegang oleh D1, D2 dan D3 di dalam Syarikat Tan Kim Choo kepada P1 (the fourth defendant herein) selaras dengan perenggan 4.1.1 wasiat mendiang Puan Chang Ying.

[14] It is perhaps necessary to mention that the matters relating to Madam Chang Ying's will are pleaded in para 26 of the amended statement of claim and in para 27 thereof. It did seem to us that the respondent claimed that Madam Chang Ying's shares also included the appellants' shares which they were supposedly required to transfer to her but were not and instead were said to be still improperly held by them. The crucial and essential point that could be made from the above pleadings in paras 27 and 30 of the amended statement of claim was that legally, any purported cause of action for the said shares laid with the estate of Madam Chang Ying and not, the respondent. On that basis, there was certainly force in the appellants' contention that it was plain and obvious that there was no privity in respect of any alleged agreement, arrangement or understanding between the appellants and the respondent upon which the respondent may mount his claim.

[15] The above submissions had been further augmented by reference to the fact that the respondent's pleadings and the declaratory reliefs sought by the respondent plainly reflected that the claim by the respondent was in effect and in actuality actions to be brought by the fourth defendant and not the respondent. Turning now to this point, it had been pressed on us in this appeal that the learned judge had erred as she had failed to give due consideration to this fact that the respondent had in his pleaded case shown that the claim was by the fourth defendant and the declaratory reliefs sought by the respondent were in truth for the fourth defendant. By virtue thereof, the respondent's claim in our judgment did not disclose a reasonable cause of action. To appreciate this contention, it would be desirable to set out the relevant pleadings which manifestly showed that the claim herein was or ought to be brought by the fourth defendant. In paras 19, 23 and 30 the respondent pleaded as follows:

19 ... Pegangan D1, D2 dan D3 (the appellants herein) ke atas 525,135 unit saham di Syarikat Tan Kim Choo tersebut secara berterusan sebagai pemegang saham berdaftar selepas Perjanjian

Lisan 2004 sehingga kini adalah semata-mata sebagai pemegang amanah kepada D4 (the fourth defendant herein).

23 ... Pegangan D1, D2 dan D3 (the appellants herein) ke atas 525,135 unit saham di Syarikat Tan Kim Choo tersebut secara berterusan sebagai pemegang saham berdaftar selepas Perjanjian Lisan 2004 sehingga kini adalah semata-mata sebagai pemegang amanah kepada D4 (the fourth defendant herein).

30 ... D1, D2 dan D3 (the appellants herein) tetap, sehingga kini, enggan dan/atau cuai dan/atau abai memindahkan 525,135 unit saham yang masih dipegang oleh D1, D2 dan D3 di dalam Syarikat Tan Kim Choo kepada P1 (the fourth defendant herein) selaras dengan perenggan 4.1.1 wasiat mendiang Puan Chang Ying.

[16] Further and as earlier-stated, the declaratory reliefs sought by the respondent are effectively for the fourth defendant. Paragraph 50 of the amended statement of claim thus states as follows:

50. Oleh itu, P (the respondent herein) menuntut seperti berikut:

(a) Suatu deklarasi bahawa Perjanjian Lisan 2004 adalah sah dan bahawa D1, D2 dan D3 adalah terikat dengan terma-terma yang telah dipersetujui di dalam Perjanjian Lisan 2004 tersebut;

(b) Suatu deklarasi bahawa D1, D2 dan D3 telah terhenti menjadi pemegang-pemegang 525,135 unit saham di dalam Syarikat Tan Kim Choo;

(c) Suatu deklarasi bahawa 525,135 unit saham di dalam syarikat Kim Choo tersebut adalah milik D4;

(d) Suatu perintah agar D1, D2 dan D3, dalam masa 14 hari daripada tarikh Perintah ini diberi, melaksanakan dan mendaftarkan Borang 32A Akta Syarikat bagi memindahkan 525,135 unit saham di dalam Syarikat Tan Kim Choo kepada D4; sekiranya selepas tempoh 14 hari tersebut telah tamat dan D1, D2 dan D3 gagal dan/atau cuai dan/atau enggan melaksanakan dan mendaftarkan Borang 32A Akta Syarikat bagi memindahkan 525,135 unit saham di dalam Syarikat Tan Kim Choo kepada P1 (D4), maka Timbalan Pendaftar atau Penolong Kanan Pendaftar Mahkamah yang Mulia ini diberi kuasa untuk melaksanakan dan mendaftarkan Borang 32A Akta Syarikat bagi memindahkan 525,135 unit saham di dalam Syarikat Tan Kim Choo kepada D4.

[17] There is not a scintilla of doubt that the pleadings and reliefs sought clearly disclosed that the claims by the respondent were actions to be brought by both the fourth defendant and the estate of the late Madam Chang Ying and not the respondent. And as aforementioned, the facts that could be gleaned from the respondent's pleadings clearly demonstrated that he was not a party in or to the purported 2004 agreement. He was, as it was clear to us, merely a

bystander with no privity and right to sue. Hence, the respondent had no locus standi to enforce the purported 2004 agreement, instead, the party ought to have been the fourth defendant or the estate of Madam Chang Ying. It is apparent that the respondent did not have a reasonable cause of action which consequently rendered his claim, which was premised on the purported 2004 agreement, plainly and obviously unsustainable and thus his suit was doomed to fail. The respondent was a stranger to the purported 2004 agreement and as a matter of law, could not take advantage of its provisions notwithstanding that some provisions thereof were intended to benefit him.

[18] The fundamental principle of law on this point has been constantly followed and repeated by our courts that only a party to a contract can sue on it and only the parties to a contract has enforceable rights and obligations under such contract. We may categorically state, as an extension to this principle, that no stranger to the consideration can take advantage of a contract, although made for his benefit. We shall, in this regard, refer to the case of *Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284 wherein Abdul Malik Ishak JCA handing down the judgment of this court said at pp 307–308:

> [67] After *Tweddle v Atkinson*, the doctrine of privity was firmly established as part and parcel of the English common law in the case of *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL). There, Viscount Haldane LC aptly said at p 853:
>
> > My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established.
>
> [68] Mohamed Dzaiddin J (later the Chief Justice) rightly said in *Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988] 1 MLJ 269 at p 271 that, 'It is clear that the English doctrine of privity of contract applies to our law of contract'.
>
> [69] The doctrine of privity of contract is here to stay. In *Murphy v Bower* (1866) IR 2 CL 506, the court categorically stated that, 'no stranger to the consideration can take advantage of a contract, although made for his benefit'. Bluntly put, only the parties to the contract have enforceable rights and obligations under the contract.
>
> [70] As an established principle of contract law, the common law doctrine of privity of contract stands for the simple proposition that, 'no one but the parties to a contract can be bound by it or entitled under it' (*Greenwood Shopping Plaza Ltd v Beattie* [1980] 2 SCR 228 at p 229).

[19] This principle was similarly applied in the earlier case of *Bacom Enterprises Sdn Bhd v Jong Chuk & Ors* [2011] 5 MLJ 820 in which this court said at paras 101–103:

> [101] ... The plaintiff is definitely not a party to the sale agreement and hence cannot enforce or rely for protection on its provisions even if some provision therein was intended to benefit him. In *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, which dealt with the English position on the doctrine of privity, Lord Reid said (at pp 472–473):
>
> > In considering the various arguments for the appellants, I think it is necessary to have in mind certain established principles of the English law of contract. Although I may regret it, I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him. That rule appears to have been crystallised a century ago in *Tweddle v Atkinson* ((1861) 1 B & S 393) and finally established in this House in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* ([1915] AC 847).
>
> [102] In *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170, the Privy Council held that the doctrine of privity applies in Malaysia. In delivering the judgment of the Board, Lord Wilberforce said (at p 174):
>
> > It is true that s 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary paras (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue.

There is not the slightest room for doubt that the instant case is eminently one in which the respondent was definitely not a party to the purported 2004 agreement and hence could not enforce or rely on its terms and provisions for protection. It was also for the above reasons that we held that the respondent's contention that his pleading had established locus standi was wholly devoid of any merit and must be rejected.

[20] We pause to observe at this point that the cause of action available to the respondent arose upon his allegation of the existence of the purported 2004 agreement. It is of some significance to mention that such allegation could not stand because the respondent had failed to establish the existence of such purported agreement when the respondent could not provide or specify the precise date upon which it was entered into. A point of importance that had emerged from this serious omission was that if the purported 2004 agreement ever existed, the respondent ought to have remembered the exact date of the alleged meeting in Singapore in 2004 which led to the conclusion of the

agreement in question. In any event, the respondent quite firmly averred that he was also present at the alleged meeting in Singapore. Accordingly, given the importance of the agreement to the respondent and his presence at the alleged meeting, we were left with the feeling that there should be no reason that he could not remember or specify the exact date to which the purported 2004 agreement was made.

[21] Needless to say, it is the respondent's obligation to ensure that all the material particulars and facts necessary to establish his case had been acquired before the filing of the claim and it was not the duty of the appellants to ask for better particulars in order to assist the respondent to sustain his claim (*Pacific Inter-Link Sdn Bhd v Wilmar Trading Pte Ltd & Ors* [2013] 7 CLJ 312). We think the point is well taken and is supported by authority and we would refer to the case of *Malayan Banking Berhad v Gan Kong Yam* [1972] 1 MLJ 32, in which the plaintiff was allowed to strike out the defendant's defence for lack of particulars and in the process Raja Azlan Shah J (as His Royal Highness then was) made the following observation:

> Except for vague dates for example 'in or about the year 1966 and subsequent thereto' contained in para 1 of the defendant's particulars, no other significant detail of dates was provided.

[22] It ought to be emphasised that the date for the conclusion of a valid contract, especially an oral one as in this instant appeal, is pertinent and must be specific to achieve certainty. It does indeed go without saying that a party intending to rely on the oral agreement cannot make an assumption of any date and failure to provide the precise date necessarily means that the plaintiff has failed to prove the existence of the same (*Keongco Malaysia Sdn Bhd v Ng Seah Hai* [2012] 7 MLJ 288). The respondent therefore had failed to plead and provide the material particulars as to the exact date of the purported 2004 agreement at this preliminary stage which was highly prejudicial to the appellants and fatal to the respondent's case.

[23] We wish to add that with regard to this issue, so far as the claim relates to the second appellant, the peculiarity of her case in the statement of defence and in reply to the respondent's pleaded case that the purported 2004 agreement was made in Singapore, one of the second appellant's main contentions is that she was not at and in fact did not attend the meeting in Singapore when the purported 2004 agreement was allegedly concluded. Without the precise date of the alleged meeting in Singapore, the second appellant was effectively prevented from providing direct evidence such as immigration records to show that she was indeed not in Singapore at the relevant time. But we should say that the respondent's reply on this aspect failed to provide a serious or clear rejoinder save for the fact that he merely sought to deflect the contention by joining issue with the second appellant preferring it

to be determined at the trial instead of providing the precise date of such meeting. The respondent's claim as it stands and in the light of the failure of the respondent to contradict the second appellant, would undoubtedly justify our finding that the second appellant did not have a case to answer. The trite principle of evidential law clearly supports our conclusion as the failure of the respondent to contradict the positive assertion of the appellant that she was not present at the purported meeting should be treated as an admission by the respondent of the fact so asserted (see *Johor Capital Holdings Sdn Bhd v Frank Khoo Shao Hong* [2002] 5 MLJ 691; [2002] 6 CLJ 288; *Pengiran Othman Shah Bin Pengiran Mohd Yusoff & Anor v Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309; [1996] 1 CLJ 257). We can thus discern from the second appellant's defence that she was not privy to the purported 2004 agreement. In law, there is no basis for the second appellant to have been made a party to the action where she was not privy to the purported 2004 agreement. As a general rule, the doctrine of privity of contract enables only the original party to a contract to sue or be sued upon it, so that a third party does not enjoy the right to sue and incurs no liability to be sued (see *Chong Nyuk Fung & Anor v Loi Lung Kiong & Ors* [1998] MLJU 41; [1998] 5 CLJ 146; *Brilliant Team Management Sdn Bhd v South East Pahang Oil Palm Sdn Bhd & Ors* [2007] 1 MLJ 536; [2006] 2 CLJ 1218).

[24] At this stage, we wish to emphasise that we accept of course the trite legal principle that no evidence shall be admissible on an application under O 18 r 19(1)(a) of the Rules of Court 2012 and that we shall only consider the pleadings to decide whether on the face of it, we are prepared to say that the respondent's claim does not disclose a reasonable course of action (see *Berjaya Development Sdn Bhd v Keretapi Tanah Melayu Bhd & Anor* [2007] 7 MLJ 489; *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226). The above analysis to the respondent's amended statement of claim as well as the appellants' defences and the application of the case authorities above, clearly demonstrate and is more than sufficient to support our inevitable conclusion that by merely looking at the pleadings, it is plain and obvious that the respondent has no reasonable cause of action. In coming to this conclusion, we are guided by the Supreme Court's case of *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385; [1985] CLJ Rep 293 which authoritatively held that on an application to strike out a statement of claim under O 18 r 19(1)(a) of the Rules of Court 2012, the right course for this court to take is to strike out the claim if we are satisfied that the claim does not disclose a reasonable cause of action. On this ground alone the appeals must be allowed and the respondent's claim struck out.

[25] In any case, there are further reasons for allowing the appeals. The respondent alleged in para 19 of the amended statement of claim that the appellants purportedly held the TKCH's shares on bare trusts for the fourth

defendant. The learned judge appeared to have been swayed by the respondent's submission on this issue in dismissing the appellants' applications. However, it was evident from the pleadings that it was an irrefutable fact that the appellants remained the respective registered owners of their TKCH's shares. That being the case, if there was any truth that there existed any form of trust as alleged, such trust was incompletely constituted. To put it in another word, there was no trust in existence and the appellants remained the absolute owner of the TKCH's shares. We would further hold that at all material times, the respondent was merely a volunteer as he had not given any form of valuable consideration for the creation of the alleged trust. We make this finding as it is obvious, settled and trite rule of equity that a court of equity will not assist a volunteer in the case of an incompletely constituted trust. Such principle is supported by authority and reference in this connection may be made to the decision of the Supreme Court in *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614 in which it was held:

> The plaintiffs were all volunteers who had not given any valuable consideration for the creation of the trust. It is a settled rule of equity that a court of equity would not render assistance to a volunteer in the case of an incompletely constituted trust where the trust property has not been finally and completely vested in the trustee.

[26] The action brought by the respondent was at best premature in light of the fact that the fourth defendant must claim for the said shares from the appellants first. The respondent's rights, based on his current pleaded facts if at all, would only exist once the fourth defendant had exercised his rights as the alleged beneficiary of the said shares. The respondent's alleged rights which he asserted as having been directly affected (if any) would only arise on the demise of the fourth defendant. Based on the reasons aforementioned, we do not think that anything material turns on the respondent's allegation of bare trusts. The declarations sought by the respondent has the effect of asking the court to enforce an alleged trust and this suit is all the more without basis, unarguably frivolous and a blatant abuse of process of the court. The learned judge did not seem to realise that the respondent's argument on this point was fallacious and thus had erroneously taken into consideration the respondent's contention that a trust was created between the appellants and the fourth defendant in which the TKCH's shares were held by the former in trust for the latter.

[27] The argument before us was also directed on the issue that the respondent's action was scandalous, frivolous and vexatious. It brings to focus the contention that the respondent's cause of action, regardless of it being founded on contract or on trust, is barred by limitation and that his conduct which can be succinctly described as 'inaction with one's eye open' is estopped by an equitable defence of laches and acquiescence from filing this suit. The appellants undoubtedly took issue on the fact that the learned judge failed to give due consideration to this material point. It therefore remains an open

question for this court to consider at this juncture. We would start off by asking the obvious question which is whether the plea of limitation is pleaded in the pleadings assuming there is a cause of action that avoids the other two reasons we have already addressed. Our reading of the appellants' defences clearly reveals that the plea of limitation is indeed pleaded therein in that the respondent's claim is time-barred by virtue of s 6(1)(a) of the Limitation Act 1953. The main bone of contention between counsel for the appellants and the respondent on this point centred on the precise date of the accrual of the cause of action. The respondent's counsel submitted that the cause of action accrued only on 30 November 2015 as it was on that date that the appellants allegedly sought to illegally remove the respondent as a director of TKCH. Prior to that date, the respondent argued, there was no breach of the purported 2004 agreement. On the contrary, taking the respondent's case at its highest, the appellants' counsel submitted that time would begin to run from 27 May 2004 after the completion of Median Vision's sale and purchase agreement, or time would begin to run from 30 July 2006 when Madam Chang Ying passed away.

[28] The issue for determination therefore boils down to the precise date the limitation period would set in. It is the appellants' case that the respondent's cause of action, was statute barred by virtue of s 6(1)(a) of the Limitation Act 1953 given that more than six years had lapsed from the time of the accrual of the cause of action. Section 6(1)(a) of the Limitation Act 1953 provides as follows:

> Save as hereinafter provided the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort

Mindful of the respondent's pleaded case that his cause of action revolved around the appellants' alleged failure to carry out the obligations under the purported 2004 agreement, we were satisfied that the cause of action could not have accrued on 30 November 2015, it had in fact already accrued on 30 July 2006. The reason is this. Pursuant to the purported 2004 agreement it was alleged that the appellants agreed to transfer their shares to the fourth defendant and Madam Chang Ying, but they failed to do so. When Madam Chang Ying died on 30 July 2006, the appellants refused or failed to transfer their shares to the fourth defendant. We may mention in this regard that one of the reliefs sought by the respondent is an order for the appellants to transfer their shares to the fourth defendant. Clearly the precise date from which time would start to run would be the date of the demise of Madam Chang Ying as this was the date, we would not hesitate to hold, the respondent's cause of action founded on a contract would have arisen which was the date of its breach (*Sampo Materials (M) Sdn Bhd v Tenaga Nasional Bhd* [2016] 1 MLJ 375 at p 381). The underlying or ultimate outcome from this delay was that limitation therefore set in after a slumber of nine years when the respondent

commenced this action on 24 November 2015 which in the result effectively rendered the respondent's claim obviously unsustainable with no chance of success. We therefore held that s 6 of the Limitation Act 1953 applied and consequently the respondent was precluded from bringing this action against the appellants. It might be apposite to emphasise that our decision remained the same even if the relevant date to determine the precise time the cause of action would accrue was 27 May 2004 for the obvious reason that whichever of these two dates were taken, the claim was already barred by limitation.

[29] The appellants had also complained that the reliefs sought could not be realised due to laches, acquiescence and delay arising from inaction or lack of positive action by both the fourth respondent and the estate of Madam Chang Ying to enforce the purported bare trusts. The authority on which the appellants principally relied on this point was the case of *Choong Howei v Cheah Choo Eng & Ors and another appeal* [2015] 6 MLJ 95 where the relevant excerpts at p 111 thereof are reproduced below:

> The often cited principle on laches is well stated by Lord Selborne in the landmark case of *Lindsay Petroleum Co v Hurd* 874 LRPC 221:
>
> > But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.
>
> A local authority on the principle on laches can be found in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 where Edgar Joseph Jr J of the High Court of Penang held:
>
> > Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1181–1182. Laches has been succinctly described as 'inaction with one eye's open'.
>
> In the present case on the facts it is clear to us that the respondents had slept upon their rights and acquiesced for a great length of time. Thus the respondents by reason of the inordinate delay and their conduct are estopped from challenging the validity of the order of 9 November 2010 or the validity of the two AGMs.

[30] The inaction by the fourth respondent, the late Madam Chang Ying and subsequently the estate of Madam Chang Ying from 2004 until the present day is obvious. We would not, in the light of overwhelming evidence, hesitate to say that it is plain that they had been quiescent for an inordinately long time. The respondent is now seeking various reliefs from the court. We need only say in this case that on the facts, it is now obvious to us that such long lapse of time would deny any rights that the respondent may have as the equitable doctrine of laches and acquiescence as provided under s 32 of the Limitation Act 1953 would prevail over the remedies sought by the respondent.

[31] With due respect to the learned judge, Her Ladyship had erred in fundamental respect of this case when she failed to give due consideration to the fact that since the passing of Madam Chang Ying in 2006 until November 2015, the respondent had slept upon his alleged rights and not taken any steps to exercise such alleged rights under the alleged contract or trust. However, the respondent only decided to take such action upon the fourth defendant having been incapacitated in August 2015 through a stroke. The respondent's acquiescence had caused the reliefs sought to be utterly destroyed due to the fact of unexplained idleness. He had not taken any action all these years but chosen to do so immediately after the fourth respondent became bedridden and was unable to make any decisions. The doctrine of laches has clearly manifested in the respondent's indolence in prosecuting his claim. Premised on the aforesaid, the respondent's claim against the appellants was clearly frivolous and vexatious rendering it obviously unsustainable given that the respondent had failed to explain the delay since 2004 when the purported 2004 agreement was agreed upon and subsequently after Madam Chang Ying's demise in 2006.

[32] The appellants' case before this court also centred on their contention that the respondent's action herein was a blatant abuse of the process of the court in the sense that his action was mala fides in nature. Having considered the entire matrix of actual facts of the case, we were of the considered opinion that the respondent's action, as we were able to discern from the pleadings, was indeed lacking bona fides and was an abuse of the process of the court. Such action was amply demonstrated by the fact that the respondent filed this suit on behalf of his father, the fourth defendant, without his instructions and subsequently changed and amended the capacity of his father from the first plaintiff at a preliminary stage in this action to the fourth defendant. It is trite law that an abuse of the process of the court arises under O 18 r 19(1)(d) of the Rules of Court 2012 where the process of the court has not been used in a bona fide manner and has been abused (*Harapan Permai Sdn Bhd v Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192). This court will not assist nor grant the reliefs sought by the respondent who comes to court with questionable intention and accordingly the bottomline is that such conduct attracts the application of O 18 r 19(1)(d) of the Rules of Court 2012 and the inherent

jurisdiction to prevent abuse of the court's process (*Raja Zainal Abidin bin Raja Haji Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16).

CONCLUSION

[33] For all these reasons, it would be our inevitable finding that the conclusion reached by the learned judge in dismissing the appellants' applications was unreasonable and erroneous. It was plain and obvious that the respondent's claim under consideration in this appeal was wholly unmeritorious and clearly disclosed no reasonable course of action and was scandalous, frivolous, vexatious as well as an abuse of the process of the court for which we had absolutely no hesitation in dismissing the claim *in limine.* We were completely satisfied that a trial of this action would not reveal or add anything more to what was already before us. In the event, we allowed all the three appeals, set aside the orders of the learned judge dated 26 April 2016 and granted order in terms of the appellants' applications. We also ordered costs of RM5,000 to be paid by the respondent to the appellants for each appeal subject of course to the payment of allocatur fees.

Appeals allowed with costs of RM5,000 to be paid to each appellant for each appeal subject to allocatur fees.

Reported by Kohila Nesan